97-84004-11

Fox, Robert James

The claim--the proof of loss--when is loss...

[New York]

c1915

97 84004-11
MASTER NEGATIVE #

COLUMBIA UNIVERSITY LIBRARIES
PRESERVATION DIVISION

BIBLIOGRAPHIC MICROFORM TARGET

ORIGINAL MATERIAL AS FILMED - EXISTING BIBLIOGRAPHIC RECORD

308
Z
Box 26

Fox, Robert James, 1867–

The claim—the proof of loss—when is loss payable? An address delivered before the one hundred and third meeting of the Insurance society of New York, on Tuesday, February 2nd, 1915, by Mr. Robert J. Fox ... [New York, C. H. Jones & co., printers] 1915.

30, [2] p. 23cm. $0.50

"'Loss adjustment' lectures": 1 p. following p. 30.

1. Insuranuce, Fire — Adjustment of claims. 2. Insurance law — U. S. I. Title.

15-10504

Library of Congress HG9721.F7
Copyright A 398658
ONLY ED

RESTRICTIONS ON USE: *Reproductions may not be made without permission from Columbia University Libraries.*

TECHNICAL MICROFORM DATA

FILM SIZE: 35mm REDUCTION RATIO: 11:1 IMAGE PLACEMENT: IA (IIA) IB IIB

DATE FILMED: 1/15/97 INITIALS: AR

TRACKING # : 20482

FILMED BY PRESERVATION RESOURCES, BETHLEHEM, PA.

BIBLIOGRAPHIC IRREGULARITIES

MAIN ENTRY: Fox, Robert James

The claim--the proof of loss--when is loss payable?

Bibliographic Irregularities in the Original Document:

List all volumes and pages affected; include name of institution if filming borrowed text.

_____Page(s) missing/not available:_____

_____Volume(s) missing/not available:_____

_____Illegible and/or damaged page(s):_____

_____

_____Page(s) or volume(s) misnumbered:_____

_____Bound out of sequence:_____

_____Page(s) or volume(s) filmed from copy borrowed from:_____

_____

X
_____Other: pagination begins with page [3]

_____

_____Inserted material:_____

TRACKING#: MSH20482

308
Z
B69L6

The Claim—The Proof of Loss—When is Loss Payable?

AN ADDRESS

Delivered before the One hundred and Third Meeting

OF

The Insurance Society of New York

ON

Tuesday, February 2nd, 1915

BY

Mr. Robert J. Fox

Of the New York Bar

Copyrighted, 1915, The Insurance Society of New York

Mr. 30, 1916-B.B

What is a Fire Claim?

Until the conviction in the so-called Markheim case recently affirmed by the Court of Appeals there had been much doubt as to what constituted a claim against an Insurance Company for the payment of a loss upon a contract of insurance. Louis Markheim, President of the Markheim Co., a corporation, was convicted after a trial lasting several days held before Mr. Justice Gavegan of the Supreme Court and a jury, and was sentenced to imprisonment for not less than 2 years and not more than 3 years and 6 months, for a violation of what is known as Section 1202 of the Penal Law, where it is provided:

> "A person, who knowing it to be such:
>
> "Presents or causes to be presented a false or fraudulent claim or any proof in support of such a claim for the payment of a loss upon a contract of insurance * * * is punishable by imprisonment for not more than five years or by a fine of not more than $500, or by both such fine and imprisonment."

An appeal was taken to the Appellate Division of the Supreme Court; the conviction was affirmed, Mr. Justice Scott writing a forceful and interesting opinion, in which all the other justices concurred (People vs. Markheim, 162 App. Div., p. 859); and on an appeal taken to the Court of Appeals was again affirmed by a unanimous court, no opinion being written.

Prosecutions had been successfully had under this statute, but in every case after the filing of a formal proof of loss, and until the Markheim case there had never been a prosecution unless in a case where such a proof of loss had been filed. It may be instructive, therefore, to review briefly the story of the Markheim case so that we may appreciate more fully the importance and far-reaching effect of the decision.

The Markheim Company, of which Louis Markheim was the president, was a corporation engaged in the business of importing, buying and selling at wholesale embroideries and laces at 12-14 West 21st Street, New York City, occupying the store and basement. The corporation had been known by the name of Bondy, Markheim & Co., and on February 28, 1913, by an order of the Court its name was changed to Markheim Company, Inc. The fire occurred just before seven o'clock on the evening of Saturday, April 12, 1913. It started in the basement and extended to the grade floor. The Fire Department responded

promptly and in a short time had the fire under control. The Markheim Company was carrying at the time of the fire insurance on stock to the amount of $131,000. Immediately after the fire the company retained public adjusters, who sent out postal cards notifying the companies of the fire loss. The loss came under the jurisdiction of the Loss Committee of the New York Board of Fire Underwriters, and a Committee of two adjusters was at once appointed. The public adjusters took an inventory of the grade floor and with the assistance of Markheim, President of the Insured, and its bookkeeper made up from the books a merchandise statement. This merchandise statement, purporting to be a true transcript of the books of the Markheim Company, was presented to the Company adjusters on April 17th; attached to it was a list of 43 Insurance Companies affected by the loss showing the amount of insurance carried in each company, and with it was submitted the inventory of the stock on the grade floor. This merchandise statement showed a sound value of stock on hand at the time of the fire of $145,663.85 and was made up as follows:

"Merchandise Statement.....Markheim Co., Inc.
Nos. 12-14 W. 21st Street.

Inventory as per ledger June 30/12		$96,606.67
Purchases less Returns,		
June 30/12 to April 12/13	$147,008.94	
Discount 6%	8,820.53	
		138,188.41
		$234,795.08
Sales less Returns	$137,038.08	
Goods out at memo	86.88	
	$137,124.96	
Less gross profit 35%	47,993.73	
		89,131.23
Showing Amt. of value on hand April 12/13 (Date of fire)		$145,663.85"

On the morning of the day following (April 18th), the Company adjusters, by appointment, made a visit to the premises, where they met Markheim, the President of the Company, its bookkeeper and the public adjusters. Markheim confirmed the merchandise statement which had been submitted by his adjusters and said that his books were true and correct; that the goods remaining in sight were so badly damaged as to be unmerchantable and there was practically no salvage. A request was then made for his books of account for examination in connection with the

statement submitted and they were examined by the Company adjusters and found to confirm the statement; the bookkeeper assumed that the books were correct and so stated.

It may be well to recall the situation as it presented itself at that time: While there was a large water and smoke damage, it was apparent that the actual burning out of sight was slight. Markheim contended that his books were correct and the sound value of the stock on hand, as stated, was $145,663.85; that the stock in sight both on the grade floor and in the basement was so badly damaged as to be unmerchantable and claimed, therefore, that the loss in fact exceeded the total insurance, $131,000, or was almost to the extent of $145,663.85, the entire sound value as shown by the books and the statement. The stock on the grade floor had been inventoried at cost at $17,327.61, and the difference between that and the sound value shown by the books should be the value of the stock in the basement at the time of the fire, or $128,336.25. It was clear to the Company adjusters from the examination of the books that the Company was insolvent and that the stock in the basement would not inventory in value much more than that on the grade floor; a condition so extraordinary as to require immediate and critical investigation.

Rumors were rife shortly after this visit of the sale just before the fire of large quantities of merchandise through auctioneers. This information came to the public adjusters and also to the Company adjusters. The public adjusters presented the situation to Markheim; he denied it, going so far as to make an affidavit, which was one of the important pieces of evidence on the criminal trial, to the effect that no sales of merchandise had been made other than in the regular course of business and that all sales appeared in the books of account. The public adjusters were not satisfied and continued their investigation and in some way learned that sales had been made through one Hartman, an auctioneer and commission merchant in laces. Markheim was confronted with Hartman and finally admitted that merchandise had been sold through Hartman and others which was not recorded in the books, and prepared and gave to the public adjusters a statement of sales that had been made amounting at cost to upwards of $30,000. The Public adjusters refused longer to represent the Markheim Company and withdrew.

Those charged with the responsibility of protecting the interests of the Companies, were satisfied from the situation disclosed on the visit to the Markheim premises and from the infor-

mation that had subsequently come to them that a claim that was in every respect false and fraudulent had been presented. The District Attorney through Assistant District Attorney Weller began immediately an investigation and the facts that I have outlined were established beyond peradventure. He was entirely satisfied a crime had been committed, notwithstanding that no formal proof of loss had been filed, and within a few days Markheim was indicted, subsequently tried and convicted and, as we have seen, his conviction unanimously affirmed by both the Apellate Division of the Supreme Court and the Court of Appeals.

To state the contention of the People and that of the defendant both at the trial and in the Appellate Courts is but to present clearly the exact issue involved:

(*a*) The People contended that when the fire occurred a valid and subsisting claim at once arose against the Companies interested in favor of the Markheim Company; that the defendant, its president, undertook to present that claim to the Insurance Companies and for that purpose hired Public Adjusters, who, pursuant to the terms of the policy, immediately notified the companies of the loss; prepared and presented under direction of Markheim the merchandise statement, which was in fact a presentation of the books themselves, and Markheim subsequently produced the books at the demand of the Company adjusters to confirm the statement submitted, stating that they were correct and that the stock remaining in sight had but little, if any, value; claiming, therefore, against the Companies that the sound value of the stock was $145,663.85 and that the loss was practically to that amount, or much in excess of the total insurance which was $131,000, and that every step that was taken, was in the presentation of that claim to the Insurance Companies; that the books were false, that sales made by the defendant had been suppressed to the extent of at least $30,000, of which no entry had been made in the books; that the defendant knew of the falsity of the claim, and every step that he took, therefore, was in the presentation of what he knew to be a false and fraudulent claim for the payment of a loss on a contract of insurance.

(*b*) The defendant on the contrary contended among other things that no claim had been presented but all the steps that were taken were merely preliminary. This and his other contentions could not be more tritely stated and answered than to quote from the brief of the District Attorney in the Court of Appeals. After reciting the facts, with which you are already familiar, he said:

> "If this didn't constitute the presentation of a false and fraudulent claim for the payment of a loss on a contract of insurance (Penal Law, 1202) it would be difficult to conceive what would.
>
> The appellant's counsel contend in substance that there can only be a presentation of a *false and fraudulent* claim when no claim at all is in existence. In other words, they contend that if, for example, there was a fire but no loss and the defendant make a claim for loss, that would be presenting a *false and fraudulent* claim; or if no fire had occurred and he presented a claim for a loss, as if goods had been damaged by fire.
>
> In other words, they contend that where some right of recovery has accrued, a defendant cannot be guilty of a violation of the statute by putting in a false and exaggerated amount. That is to say their contention is in substance that if a loss, of say $1, had occurred, and a loss of $50,000 was claimed, it would not be the presentation of a false claim.
>
> This contention is, we submit, palpably absurd."

The Appellate Division did not discuss these contentions of the defendant, but disposed of any lingering doubt that might remain as to the character of the acts of the defendant where in its opinion, through Mr. Justice Scott, it said at page 859:

> "The evidence tended to show that the defendant was president of a corporation known as Markheim & Company, which carried a considerable stock of goods insured in 43 different insurance companies to an aggregate amount of $131,000; that a fire occurred doing considerable damage; that immediately after the fire, indeed on the evening of the same day, defendant as president of the corporation made a written contract with a firm of public fire adjusters retaining them on a percentage basis to advise and assist in the adjustment of the loss with the insurance companies; that said adjusters immediately notified in writing the companies interested of the fact of the fire and the loss; that thereupon a committee of two adjusters was appointed * * * to represent as adjusters the companies affected by the loss; that defendant, in order to establish a basis for such adjustment caused to be made up and submitted to the Committee of Adjusters representing the insurance companies a statement purporting to show in detail the amount and value of the goods on hand at the time of the fire; that such statement was false and known to the defendant to be false and was prepared and presented with the purpose and intent of defrauding the insurance companies into paying a greater sum than the loss actually suffered. It should be said at the outset that the evidence leaves no possible doubt in our minds of the defendant's guilt."

It may be interesting to recall some of the evidence adduced during the course of the trial to show Markheim's method of operation, in some respects rather ingenious. You may remember that the corporation had changed its name in February from Bondy, Markheim & Company to Markheim Company, Inc. After the change was made Markheim opened personally an account in the Union Exchange National Bank using the old name Bondy, Markheim & Company, and in this account he deposited a large part of the proceeds of suppressed sales of merchandise which he used for his own purposes, many of the Hartman checks being drawn to the order of Bondy, Markheim & Company. He used this account, in other words, as a "clearing house" for many of these transactions. There were other bank accounts, one in the name of a member of his family, in which similar transactions to a large amount were traced. In several instances in what was known on the books as the "Exchange Account" would be found amounts representing checks drawn to "Cash" which were finally traced to be the proceeds of a sale not entered and which had been deposited in the regular account of the Markheim Company and checks then or later drawn to Markheim at his request for the same amount. It may be assumed that in many instances the reason for making these seemingly helpful contributions was because of a real necessity at that particular time for protecting the regular bank account of the company against overdraft; the contributions were but temporary, however, and were not permitted to remain for any length of time. At another time the bookkeeper was informed by Markheim that merchandise, the sale of which had been regularly entered in the books and for which he had received a check in payment, had been returned; the account of the customer was then credited by her with the return of the merchandise and the check which he had received in payment was deposited in one of his "clearing house accounts" mentioned. Another and rather interesting instance, in that it differed from the method ordinarily adopted, was a transaction with Siegel & Company of Boston. It appeared that merchandise had been sold to Siegel & Company but all the sales had not been entered in the books. When the check for the Siegel purchases was received it was naturally for an amount larger than the sales appearing in the books. Markheim told the bookkeeper that it was an overpayment, and at his request she made an entry in the stub of the check book of a check to return to Siegel & Company the amount of the overpayment, but when she drew the check itself she was asked by

Markheim to draw it to "Cash" so that it might be put through the Siegel New York store. It is hardly necessary to add that the check found its way into Markheim's personal account. These transactions are fairly illustrative of the manner in which Markheim operated in suppressing sales and appropriating the proceeds. The bookkeeper had no reason to question the accuracy of the books and was not cross-examined. The defendant did not take the stand but rested upon the contentions already set forth.

It will not be surprising to learn that while on the criminal trial the suppression of sales, for reasons which the District Attorney thought sufficient, was confined to about $30,000, which had been admitted by Markheim; there was in fact suppression of sales of upwards of $70,000.

The Markheim Company subsequently filed formal proofs of loss on the companies interested, verified by the Secretary, in which it was claimed that the sound value of the stock in sight at the time of the fire was not $145,663.85, but $73,441.41, with a damage of $49,832.07, and in the claimed sound value and damage was included an amount of $15,000 as the value of goods burned out of sight. It would appear, therefore, from the proofs of loss, indulging in what, under the circumstances, might be said to be a violent assumption even for the purpose of argument that they are correct, that merchandise of upwards of $70,000 at the least had been taken from the premises before the fire, sold and the sales suppressed. The Markheim Company was in fact insolvent, was finally adjudged bankrupt and a trustee appointed, who instituted civil actions against the companies interested which are on the calendar of the Court but have not been tried.

The criminal case has passed into history and another and most important step has been taken not only for the protection of the Insurance Companies against fraudulent claims but indeed for the protection of the entire community. The effect of such a decision can hardly be measured; it will deter one so disposed from presenting or attempting to present a fraudulent claim for he is warned by the Markheim case to have a care at the very outset that his claim be honest and that in the State of New York at least a crime may be committed under this Section of the Penal Law notwithstanding that there has been no filing of formal proofs of loss and it will naturally have a strong tendency to discourage fraud of every kind in relation to the insurance contract—a contract with which the Public interests are so closely related.

While there had been much doubt, therefore, as to what constituted a claim against an Insurance Company that has now been dispelled. There has never been much question as to what really constituted a satisfactory *formal* proof of loss, and the doubt, if any there be, may be caused in part at least by the decisions involving the application of the doctrine of waiver and estoppel. The question is interesting; it is one of the many that are included in the subject of this evening.

And in this connection it may be said that we can do no more this evening than to touch on the salient points of the cases construing this and similar conditions of the policy in view of the ramifications of the subject. It would seem, indeed, a work of supererogation to do more than to review briefly a subject which has been given so much critical consideration by the text writers on Insurance Law, to whose indefatigable labors in research, painstaking analytical discrimination and lucidity of exposition this modest paper owes its being.

The conditions that we are now to consider are those that apply only after the loss has occurred and it may be well to recall the significant language of *McNally v. Ins. Co.* (137 N. Y., 389), where the court said at page 397:

> "Those conditions which operate upon the parties and the contract prior to the loss, such as the condition and situation of the property and the relations of the insured to it, and all statements and representations preceding the contract, are matters of substance, upon which the liability of the insurer depends. Such stipulations are important, as their general object is to define and determine the limits of the risk assumed and to point out the conditions and circumstances under which the insurer has agreed to become liable in case of loss. Those conditions are to receive a fair construction according to the intention of the parties. Those conditions which relate to matters after the loss, have, for their general object, to define the mode in which an accrued loss is to be established, adjusted and recovered, after the reciprocal rights and liabilities of the parties have become fixed by the terms of the contract, and are to receive a more liberal construction in favor of the insured. In determining the liability of the defendant it is entitled to the benefit of its contract fairly construed and can stand upon all of its stipulations. But when its liability has become fixed by the capital fact of of a loss, within the range of the responsibility assumed in the contract, courts are reluctant to deprive the insured of the benefit of that liability by any narrow or technical construction of the conditions and stipulations which prescribe the formal requisites by means of which this accrued right is to be made available for his indemnification."

Compliance with these and other conditions may of course be waived or the company may so act as to estop itself from insisting upon it. We shall consider the subject of waiver and estoppel only in so far as it relates to the conditions which are the subject of the talk this evening, and it might be well to have a clear definition of those terms, and we find it in *Draper v. Oswego Fire Relief Assn.* (190 N. Y., 12), where the Court in reviewing other well known cases said, at page 16:

> "The law as to what constitutes a waiver was correctly laid down by the trial judge substantially in the language used by this court in Kiernan v. Dutchess County Mut. Ins. Co. (150 N. Y., 190) and repeated in Walker v. Phœnix Insurance Co. (156 N. Y., 628). * * * While that doctrine and the doctrine of equitable estoppel are often confused in insurance litigation, there is a clear distinction between the two. A waiver is a voluntary abandonment or relinquishment by a party of some right or advantage. * * * The doctrine of equitable estoppel, or estoppel *in pais*, is that a party may be precluded by his acts and conduct from asserting a right to the detriment or prejudice of another party who, entitled to rely on such conduct, has acted upon it."

Two of these conditions, the notice of the fire and the proof of loss, are what the law regards as conditions precedent, that is to say, they are conditions which precede any liability and must be complied with by the insured without any requirement on the part of the company before the loss becomes payable. Other provisions, which have been aptly termed requirements, are those with which the insured need not comply unless requested so to do, such as furnishing magistrates' certificates, plans and specifications, books and bills, the examination under oath and the appraisal; in some states however a "disagreement" as to the amount of the loss would make the appraisal too a condition precedent to any action on the policy.

The Notice of Loss.

Before taking up the subject of the inventory and proof of loss, we might stop to consider that condition of the policy which requires *immediate* notice of loss in writing. The object of the notice is that the company may know that a loss has in fact occurred, and take such action as it considers proper to protect its interests. This condition has been construed from time to time and there are many cases in this and other states relating

to it. While the policy condition in terms requires an *immediate* notice of loss, it might be said from an analysis of the many decisions on the subject that notice must be given with due diligence and as soon as circumstances will permit, and that what, under the circumstances, is a reasonable compliance with the condition must be determined from the facts of each case.

It would appear (*a*) that if the company knew of the fire or got notice of it from any one it would be sufficient. For example, if an officer of a company knows of the fire and visits the place of the fire *Roumayer v. Ins. Co.* (13 N. J. L., 110) (*b*) that delay in giving notice may not under the circumstances be unreasonable.

In *Will & Baumer Co. v. Rochester German Ins. Co.,* (140 App. Div., 691), a proof of loss was served within sixty days after the fire, there being no previous notice of loss. The delay was due to the fact that owing to the confusion after the San Francisco earthquate and fire, plaintiff was for fifty days unable to ascertain what property had been destroyed, and it was said, per Robson, J., at p. 694:

> "It would seem that the useful purpose to be served by requiring plaintiff to give defendant this notice was that it might be promptly advised that a fire had occurred. That information defendant had as early and quite as fully and particularly as had plaintiff."

And in *Solomon v. Ins. Co.* (160 N. Y. 595) where by reason of failure to obtain the policy for about fifty days after fire no notice was given until that time by a general assignee for creditors, the Court held the notice sufficient.

(*c*) That the company may of course waive the notice or so act as to estop itself from insisting upon the breach, as by denying liability (*Omaha Ins. Co. v. Duke,* 43 Neb., 473); or by requiring corrections in proofs filed (*Weed v. Ins. Co.,* 133 N. Y., 394).

The Inventory.

The policy requires, as the next step we are to discuss, that the insured shall make a complete inventory, stating the quantity and cost of each article and the amount claimed thereon. While there is no specific provision requiring the insured to furnish the inventory to the company, the only reasonable inference is that that is the purpose in having it made, and a reasonable interpretation of the policy condition would require that the inventory should be delivered to the company. As a matter of practice this is generally done, in this city at least, and is one of the first

steps taken by the Public Adjuster, and a copy is ordinarily attached to the proof of loss.

It is provided that the insured shall state in the inventory the cost and quantity of each item of damaged and undamaged property and the amount claimed and in the proof of loss the cash value of each item and the amount of loss thereon.

The Court in *McManus v. Western Assn. Co.* (22 Misc. 269; affirmed 43 App. Div., 550) pointed out the difference between the two papers.

The Proof of Loss.

The policy conditions on the subject of the proof of loss are clear and concise, and the company is entitled to receive from the insured so much of the information therein specified as he can with due diligence furnish. A glance shows the information to be of great importance to the company; it relates to knowledge of the origin of the fire, the title to the property, the cash value of each item and the amount of loss thereon, other insurance, etc., and may be insisted upon, and the insured will not be excused from complying unless under circumstances where he is unable to do so; he is bound to do what is reasonable to fully comply with the conditions.

A statement showing the cash value of each item and the amount of loss thereon is of course often impracticable and is generally complied with by submitting, with an inventory of the stock in sight and the damage claimed, a statement made up from the books, taking the latest inventory as its starting point and adding the purchases and labor and deducting the sales with a proper allowance for profit, thus getting the sound value at the time of the fire and the claimed loss.

The Court in the *Davis* case (15 Misc., 263; affirmed 157 N. Y., 685) refers to the practice.

Where an attempt is made to comply with the provisions and a paper purporting to be a proof of loss is filed with the company within the time limited and is defective, either by reason of the failure to state the requirements of the policy provisions or by some defect in the signature or oath, then it is the duty of the company to object to the proof, so that the insured may correct it; and if the company fail to take such action it would be estopped from contending thereafter that the proofs of loss did not comply with the conditions of the policy. Cases in which this question was discussed are the following: In *Weed v. Ins. Co.* (133 N. Y., 394) it was held that an objection that proofs

had not been made by the proper person is untenable if they were retained without objection. And in *Cummer v. Ins. Co.* 67 App. Div. 151; affirmed 173 N. Y., 633) it was held that where the insurer retains proofs filed in attempted compliance, it cannot set up as a defense that they were incomplete.

The objections, if any, to the proofs must be taken within a reasonable time, they should be specific and the insured given a reasonable time thereafter to correct the claimed defects; and what is a reasonable time will be determined from the facts in each case; it might under some circumstances extend beyond the sixty day limit (*Planters Mutual Insurance Association v. Hamilton,* 77 Ark., 27). It would seem that such defects as are not specifically pointed out would be waived (*Titus v. Glens Falls Ins. Co.,* 81 N. Y., 410; *Levine v. Lancashire Ins. Co.,* 66 Minn., 138).

The general rule is that the mere retention of an informal paper which does not in any way attempt to comply with the conditions of the policy respecting proofs of loss would not estop the company from insisting that they had not been complied with (*Beatty v. Ins. Co.,* 66 Pa. St., 9); it is necessary however to consider the following cases where it was held that the company may so act in relation to a purely informal paper as to estop itself from insisting upon a formal proof. The case of *Glazer v. Ins. Co.* (190 N. Y., 6) involving a loss of household furniture was tried two or three times and finally went to the Court of Appeals. It appeared that the insured had filed an inventory unverified showing the quantity and cost of the property destroyed and injured, and the amount claimed thereon. The Court of Appeals, by a divided court, held that it was a question of fact for the jury to determine whether the defendant by retaining the paper without any objection until the sixty days had expired, by using it for the purpose of identifying property and ascertaining for itself the amount of the damage to the various articles covered by the policy, and then entering upon negotiations based upon the contents of the paper for a settlement of the claim, lead the plaintiff to believe that no further proofs of loss would be required and so waived their service. Similar cases are: *Greengrass v. North River Ins. Co.* (139 Supp., 937); *Curnen v. Ins. Co.* (159 App. Div., 493); *Weber v. Germania Ins. Co.,* (16 App. Div., 596).

The Glazer and similar cases were, however, decided upon the peculiar facts of each and must be looked at from that view point. They will not, of course, be held applicable to the

ordinary case where the complete inventory mentioned in the policy is filed and the usual investigations made, and it may be observed that the Court in the Glazer case does not accurately set forth the policy conditions, but confuses the complete inventory with the proofs of loss, saying at page 10:

> "The provision of the policy in respect to proofs of loss is, in substance, that if a fire occurred the insured should give immediate notice of any loss to the company in writing; *make a complete inventory* of the property lost or damaged, stating the quantity and cost of each article and the amount claimed thereon, *within sixty days after the fire, and signed and sworn to by the insured,* stating the time and origin of the fire and other matters not material to this appeal. The paper contained a complete inventory of the property damaged or destroyed and the amount claimed on account of each article, which aggregated $242, but was not signed or sworn to by the insured."

Where other interests are insured by the policy, an important question arises as to whether they can protect that interest by filing a proof of loss where the insured has failed to do so or, indeed, whether they are in such a case required to file any proof. These question arise, among others, in three cases. Where there is (1) a mortgagee claiming under a Standard Mortgagee Clause; (2) a simple loss payable clause to a mortgagee or other interest; and (3) a Trust and Commission Clause. These particular interests are to be treated by others later during this course and will not now be considered further than to say that such interests may under certain circumstances file proofs (*McDowell v. Ins. Co.,* 207 N. Y., 482; *Czerweny v. Ins. Co.,* 139 Supp., 345); and it might be argued that these and other cases are authority for the proposition that there is no condition of the policy requiring them to do so; while this is undoubtedly true regarding the interest of a mortgagee under a Standard Mortgagee Clause (*Heilbrunn v. Ins. Co.,* 202 N. Y., 610), such an argument would do violence to the plain reading of the policy provisions in so far as any of the other interests mentioned are concerned.

The general opinion of the text writers is that the company has the right to insist that the proof of loss shall be signed and sworn to by the insured. Exceptional cases are *McManus v. Ins. Co.,* (22 Misc. 269; affirmed 43 App. Div. 550), where in a loss on household furniture it was said that the Company could not require the oath of members of the household owning articles claimed for; *Sims v. Assurance Co.,* (129 Fed. (Ga) 804), by a Receiver in Bankruptcy which included an affidavit by the agent of insured; the insured having fled the jurisdiction;

Matthews v. Ins. Co., (154 N. Y. 449), where it was said that either the Temporary administrator, the heirs, next of kin, legatees or devisees might have filed proofs.

The Company may, of course, waive the signature and oath of the insured or estop itself from insisting upon it by failing to reject proofs verified by one other than the insured (*Kernochan v. Ins. Co.*, 17 N. Y., 428; *Weed v. Ins. Co.*, 133 N. Y., 394).

There is no specific requirement in the policy as to where the proofs shall be filed; the insured is required to render the statement to the Company and it may be useful to note some of the decisions on that subject. The condition will receive a reasonable interpretation. In Iowa filing the proofs with a local agent is sufficient (*Greenlee v. Ins. Co.*, 104 Iowa, 481); in Nebraska with a State agent (*Ins. Co. v. McLimans*, 28 Nebraska, 653); and in Georgia with an adjuster (*Ins. Co. v. Vining*, 67 Ga., 661).

The condition that proofs of loss are to be filed within sixty days after the fire, unless such time is extended in writing by the company, has given rise to some questions worthy of review.

The words "sixty days after the fire" have been interpreted by the Court to mean that the time begins to run from the termination of the fire and not from the time of the commencement.

National Wall Paper Co. v. Ins. Co., (175 N. Y., 226, at page 228:

> "We think, therefore, that the fair and reasonable interpretation of the provision is that the proofs of loss should be served within sixty days after the fire has terminated, or abated to such an extent that an inspection of the property damaged may be had."

Mailing the proofs before the expiration of the time limit is not sufficient; the company must receive the proofs within the sixty days. In the case of *Peabody v. Satterlee* (166 N. Y., 174) it was held that mailing proofs of loss in Buffalo on the sixtieth day for delivery in New York, which did not reach the Underwriters until the sixty-second day, was not a compliance with the condition; and it would be reasonable to assume from the reasoning in that case that it would not be a sufficient compliance if the proof were mailed on or before the time limited in a city where the Insurance Company had its office and where the custom of the Postal Authorities is to deliver the mail by carriers, but which did not in fact reach the company until after the time limited. The Court, citing the case of *Crownpoint Iron Co. v. Aetna Insurance Company* (127 N. Y., 608), said, p. 178:

> "The above case, while not presenting the question now before us, is instructive as deciding that when the insured uses the mail in communicating with the company it is nothing more that if he had made the same communication by private messenger, when he is seeking to do an act that would be binding on the company whether it was willing or not.
>
> As already pointed out, the policy provides that the assured within sixty days shall render this statement. The Century Dictionary defines the word 'render' as meaning 'to give; furnish; present.' Webster's gives its meaning as 'to furnish; state; deliver.' A proper reading of the quoted provision of the policy is that the insured is to furnish or deliver to the defendants these proofs of loss, and this clearly means that the papers shall be so furnished to the defendants personally, or to their duly authorized agent if they have one. In cases of this kind substituted service or service by mail is either matter of statute or contract. In this case the contract is silent, and the depositing of the proofs of loss in the mail at Buffalo on the sixtieth day after the fire occurred cannot be held a compliance with the provisions of the policy."

This case was followed in *Lake Geneva Ice Co. v. Selvage* (36 Misc., 212), where the proofs were mailed in Chicago on the sixtieth day for delivery in New York; to the same effect, *Slocum v. Saratoga Ins. Co.*, (140 App. Div., 867). A somewhat contrary doctrine has, however, been held in Illinois (*Ins. Co. v. Zeitinger*, 168 Ill., 286), where the agent of the insured's executor under a policy containing a similar provision was said to have complied with the provision by mailing proofs within sixty days which were received two days late. And in Missouri (*Caldwell v. Ins. Co.*, 61 Mo. Ap., 4) where proof mailed in Missouri directed to the Company at Boston, Mass., a few days before the expiration of the time limited reached the *post office* at Boston on the last day, it was held sufficient and the Court said:

> "The defendant cannot by delaying to call for the proofs under these circumstances work a forfeiture. It might as well delay for the calling of the proofs on the succeeding day and thus work a forfeiture.
>
> The proof shows that the defendant had a box at the Post Office and it nowhere shows that the notice of the Registered letter was not in that box in time on Sunday to have enabled the clerk of the defendant to get the package on that day had he called for mail in the box."

In New York State under Section 20 of the General Construction Law, Chapter 27, Laws of 1909, if the sixtieth day

occurred on Sunday it would be sufficient compliance if the proofs were received by the Company on the following day.

This condition, like others, may be waived or the company be estopped from complaining. Cases involving these questions are numerous and we may stop to consider a few of them.

(*a*) The mere retention of the proofs would not, in this State at least, waive the time limit.

In *Perry v. Caledonian Ins. Co.* (103 App. Div., 113) plaintiff served proofs sixty-five days after the fire and it was held that the performance of the condition was not waived by their retention; it was said per Houghton, J., at page 116:

> "It is urged that the retention of the proofs of loss and failure to return them was a waiver of earlier service, and that the defendant is now estopped from claiming that they were not regularly served. We do not think this position is tenable. Silence operates as an assent and creates an estoppel only where it has the effect to mislead. (More v. New York Bowery Fire Ins. Co., 130 N. Y., 537). The plaintiff was in no way misled by the retention of the proofs of loss. His rights were gone before he attempted to serve them. His position was made no different because the company ignored his statement or failed to inform him that his proofs of loss were not properly furnished."

And in *Bell v. Ins. Co.* (19 Hun., 238), where the fire occurred on January 11, 1873, and they were mailed sixty days thereafter but not received until after the expiration of sixty days, held there was no waiver by retaining them.

(*b*) The retention of proofs filed after the time limit where acts are done which may mislead the insured into believing that the objection will not be taken may estop the company from insisting on the breach. *Brink v. Hanover Fire Ins. Co.* (80 N. Y., 108), is a case in point and the language used is somewhat disturbing but on a careful examination of this and similar cases it will be seen that it is not held that the mere retention of the proofs would be an estoppel, but there were other facts taken together with the retention of the proofs which were held sufficient to estop the company from claiming a breach of the condition and the language must be considered in association with the other facts in this case. The Court said in the Brink case at page 113; per Church, C. J.:

> "The plaintiff's claim was challenged for fraud and that only. They acted upon it and brought an action incurring large expenses in its prosecution. *Non constat*, if the failure to file the proofs in time had been insisted on, but that the plaintiff would have acquiesced in it and refrained from prosecuting, and thus they might be injured by the change of ground on the part of the defendant. Every consideration of public policy demands that insurance companies should be required to deal with their customers with entire fairness and frankness. They may refuse to pay without specifying any ground, and insist upon any available ground, but if they plant themselves upon a specified defense and so notify the assured, they should not be permitted to retract after the latter has acted upon their position as announced, and incurred expenses in consequence of it. If a company intends to avail itself of the technical objection that the proofs are not filed in time, common fairness requires that it should refuse to receive them on that ground, or at least promptly notify the assured of their determination, otherwise the objection should be regarded as waived."

Similar cases are *Rademacher v. Ins. Co.* (75 Hun. 83); *Dobson v. Ins. Co.* (86 App. Div., 115: affd. 179 N. Y. 557):

We have considered specific instances of the application of the doctrine of waiver and estoppel in relation to the proofs of loss where there has been some attempt at compliance and it might be wise to add a word as to the character of the action by the company or its authorized representatives that would make unnecessary the filing of any proof of loss: (*a*) where the action of the company has induced the insured not to make proofs (*b*) where it recognizes liability and indicates that proofs will not be required, and (*c*) where the company makes it apparent that the furnishing of proofs would be a useless formality—by denying liability.

We must not overlook, however, in this connection the provisions of the policy to the effect that the company shall not be held to waive any of the conditions or any forfeiture by any act, requirement or proceeding on its part relating to the appraisal or the examination.

This provision of the policy has been held binding generally in the following cases but the point whether an examination or appraisal might be held to waive proofs of loss was not in question and not considered.

In *Gibson Electric Co. v. Ins. Co.* (10 App. Div., 225; affirmed 159 N. Y., 418), it was held that, under a standard policy, proceeding with an appraisal was not a waiver of a forfeiture. A similar case is *Walker v. Ins. Co.* (156 N. Y., 628).

The case of *Paltrovitch v. Ins. Co.* (68 Hun. 304-308 affd. 143 N. Y., 73) would seem to be an authority for the statement

that the examination would not be a waiver of proofs of loss and the case of *Rademacher v. Ins. Co.* (75 Hun. 83), while very close, can be distinguished for the reason that there were apparently acts other than the appraisal in question.

In Rhode Island (Fournier v. Ins. Co., 23 R. I., 36) it was held that under such a provision no waiver of proofs would result from a demand for an appraisal; while in Kentucky (*Smith v. Herd,* 60 S. W., 841) involving a policy containing a similar provision it was held that by an appraisal there had been a waiver of proofs of loss; and in Wisconsin (*Badger v. Ins. Co.,* 49 Wis., 396) where there was no such provision it was held that calling an examination within the sixty days from the fire was a waiver of proofs of loss.

It may be said, therefore, that in New York State the provision would be held binding and that no waiver or estoppel as to proofs of loss could be based upon examination or appraisal required within a reasonable time.

There are cases in New York State holding that an examination called (*Carpenter v. Ins. Co.,* 135 N. Y., 298) or an appraisal instituted (*Bishop v. Agricultural Ins. Co.,* 130 N. Y., 488) after "tardy" proofs would waive the forfeiture; they may be distinguished, however, for the reasons (*a*) they were decided before the Standard Policy took effect and the provisions were dissimilar, and (*b*) there were other facts taken in connection with the examination or appraisal which were in fact the basis of the court's decision.

Before leaving the conditions respecting the proofs of loss, it may be well to call attention to the statute in New Jersey which relieves the insured from filing proofs unless requested to do so. The statute (Chapter 340, Laws of 1911, Sec. 1) reads as follows:

> "Sec. 1. The failure of any person insured against loss or damage by fire in any insurance company doing business by or under the authority of the Department of Banking and Insurance of this State to furnish proofs of loss shall not be or considered a waiver of any rights accruing under the policy of insurance, and shall not debar the person so holding insurance from a recovery under said policy or the collection of such sum as should properly be paid under said policy, unless after said loss sixty days' notice, in writing, that said company desires said proofs of loss be furnished the person so insured."

It will be noticed that there is no time fixed within which the company is required to demand the proofs, but sixty days' notice must be given; it will probably be held, when the question

is presented that the company should make its demand within a reasonable time and at least within sixty days after the fire, as under the loss payable clause, the loss, in the absence of a demand for an appraisal, would otherwise become payable sixty days after notice of the fire.

PLANS AND SPECIFICATIONS; MAGISTRATE'S CERTIFICATE.

Among the requirements are found that of the Magistrate's certificate and the production of plans and specifications and while we know that these are not a part of the proofs of loss they may be required and thus become requirements with which the insured must comply. Much has been written regarding the Magistrate's certificate and in some communities it is still a requirement of some importance to the Company; it is not often insisted upon in this City.

The production of plans and specifications is often a requirement of great importance and frequently demanded. These and similar requirements are subject to the rule of reason. Wherever the question has been discussed it resolves itself into what is reasonable. The demand must be made within a reasonable time and a reasonable compliance with due diligence must be made and, until had, no suit may be maintained as we shall see when we reach that provision of the policy. There is nothing new in the books on this subject and we might in passing restate some of the decided cases giving the best illustration of the manner in which the provisions relating to the magistrate's certificates have been construed.

The demand must of course be a specific one apprising the insured what will be required. *Moyer v. Ins. Co.* (176 Pa. St., 579). The magistrate or notary must be disinterested and he may be disinterested though he is a creditor of the assured, *Dolliver v. Ins. Co.* (131 Mass., 39); but not if he is a relative, *Ins. Co. v. Bank* (62 Fed., 222); nor if he is the insured although he has assigned the policy, *Stevens v. Ins. Co.* (32 New Brunswick, 394). A magistrate lives nearest the place of the fire, if either his office or his residence is nearest to it, *Paltrovitch v. Ins. Co.* (143 N. Y., 73). The affidavit of the magistrate must contain a venue or it will be fatally defective, *McManus v. Western Ins. Co.* (22 Misc., 269). If the certificate states that the insured has sustained the loss claimed it is sufficient, *Brown v. Hartford Ins. Co.* (52 Hun. 260; affirmed without opinion 132 N. Y., 539). If required within sixty days after the fire the certificate must be furnished within the sixty days, *Gottlieb v.*

Ins. Co. (89 Hun. 36). If the nearest magistrate refuses to issue a certificate that of the next nearest may be secured, *Lang v. Ins. Co.* (12 App. Div., 39). If the company desires to raise the objection that the certificate is not made by the magistrate or notary living nearest the place of the fire it should state the name of the one living nearer the fire so that the insured may obtain his certificate, *Paltrovitch v. Ins. Co.*, (143 N. Y., 73).

THE EXAMINATION UNDER OATH; THE BOOKS AND BILLS.

The examination under oath of the insured and the production of books of account and bills are two very important requirements of the policy in the investigation of the loss and its determination. It may be said that in some cases the examination is imperative, in others necessary and in most cases which seem to require any investigation very useful. There has not been much discussion in the courts of these provisions of the policy for the reason that they are generally complied with. It may be said generally that such an examination must be called within a reasonable time and conducted in what under the circumstances of each particular case is a reasonable manner. Many questions relating to such an examination arise as to which no answer may be found in the decided cases and one must be guided by the rule of reason. What is a reasonable place to hold such an examination, or rather what is a reasonable place to require the insured to attend for such examination is often asked. A glance at the cases will show some difference of opinion but no fixed rule. This question came up recently in our Courts in the case of *Kline Brothers & Company v. Factors Insurance Co. of Memphis, Tenn.* (156 A. D., 945) where the policies covered property in Quincy, Florida, the property of a corporation, and were issued by companies not admitted in that state. The insurer called an examination to be held at Cleveland, Ohio, where the corporation maintained an office, or in the alternative at New York where its books and contracts were. The corporation refused to submit to examination at any place other than at Quincy and the insurer did not wish to conduct an examination there as it had no license to do business in Florida. A jury found that the demand made by the Insurer was reasonable and that the insured had not complied with the condition of the policy requiring examination. The judgment entered on the verdict of the jury was affirmed without opinion in the Appellate Division and an appeal is now pending in the Court of Appeals. In Missouri it is said that when the insured resided in New York and insured his property in Missouri

in a Missouri Company he could be compelled to submit to examination where the insured property was located, *Fleisch v. Ins. Co.* (58 Mo. Ap., 596), and similarly, in another case, *Murphy v. Ins. Co.* (61 Mo. Ap., 323), it was held that insured was not required to produce his books at the office of the adjuster six miles from the place of the fire the court saying:

> "In our opinion the provision should not ordinarily be considered as embracing any other places than at or near the scene of loss."

In Illinois on the contrary it was held that insured living in Illinois claiming for property located in Missouri and insured in a Missouri Company could not be required to submit to examination in Missouri, *Ins. Co. v. Simpson* (43 Ill. Ap., 98). In Pennsylvania, the courts have decided that it was reasonable to require that where the fire occurred in the place of business of the insured at Lancaster he could be compelled to produce his books in an adjacent county where the insurer maintained its office, *Seibel v. Ins. Co.* (46 Atl. 851). In Nebraska the courts have said that the place of examination must be one conveniently reasonable and in the county where the insured resides, *Aetna Ins. Co. v. Simmons* (49 Neb., 811).

It will be seen that it is impracticable to deduce any fixed rule from such decisions as have been rendered and one might advise that the company should in making its demand fix a place that under the circumstances would appeal to the ordinary man as being a reasonable place, reasonably convenient to both insured and insurer and not imposing any undue hardship on either. If I were asked to make any suggestion on the subject I should say that the examination should be required only when necessary for the protection of the company's rights and then one should pursue the lines of least resistance with an eye single to the accomplishment of the desired object.

A question even more important comes up frequently and is not easy of solution—Who may be examined under this provision of the policy? The policy, it is true, states that it is the insured and the inquiry arises whether the company has the right to examine any person other than the insured. One gets but little light from any of the books on this subject and it may be said that it is still an open question. In a recent case in our own City Court. *Friedman v. Ins. Co.* (New York Law Journal, May 20, 1913; aff'd without opinion at the Appellate Term of the Supreme Court in May, 1914) it was said by the court, in denying a motion to set aside a verdict where the jury had been permitted

to consider whether the company was justified in insisting upon the examination of the son of the insured, in view of the insured's statement that he knew nothing about his books and that his son knew all about them, that the jury was entitled to consider whether or not the failure to produce the son, who was under the control of the insured, constituted performance of the terms of the contract of insurance on the part of the plaintiff and a verdict for the defendant would not be disturbed. While there does not seem to be any other decision on the subject which a diligent search of the books would disclose, it is not unreasonable to assume that whenever the question is presented it will be determined somewhat from the standpoint of common sense. It was intended, I take it, that the company should by that provision have the opportunity to satisfy itself as to the facts and circumstances surrounding the fire and claim and that such an inquiry under the provisions would be useful for that purpose, not futile or fruitless.

There are many instances where the insured knows nothing of the property involved or of the circumstances concerning the loss, but has left the care of the entire matter to some other person acting for him and under his control; and it would seem under such circumstances that a reasonable interpretation of the provision would require that an examination of that person, the insured's *alter ego* as it were, should be permitted. What is true of the enforcement of other provisions of the policy is also true of this one, that each case would depend upon its particular facts and what under the circumstances would be reasonable would control. It may be said, however, in this connection that the company has the absolute right to the examination of the insured; and it may be of interest to consider the effect of an offer of a Receiver in Bankruptcy to submit to examination in the absence of the insured and as a substitute for him. That particular situation arose in Georgia, and the Court held (Sims v. Assurance Society, 129 Fed. 804) that such a Receiver could not in respect to the right of the company to an examination under oath take the place of the insured. A case involving a somewhat similar principle arose in South Carolina (*Pearlstine v. Ins. Co.*, 70 S. C., 75).

The general statement is made from time to time that on such an inquiry only material questions need be answered; this is unquestionably so, but it would seem that a rather wide latitude should be given in view of the nature of the inquiry and its logical relation to those conditions of the policy providing for

the information required by the inventory and the proofs of loss and for forfeiture in case of any fraud or false swearing and would make material any inquiry "touching any matter relating to the insurance or the subject thereof whether before or after a loss."

The materiality of the question must of course be determined in the first instance by the insured; there is no process through which may be compelled to answer. And what is a material question, of course, will in the last analysis be decided by the courts and only when that question arises in an action brought to recover the loss. What is and what is not a material inquiry upon such an examination may be a question of law for the court, or of fact for a jury, depending upon the facts and circumstances of the case. Cost for instance may not always be a material inquiry (*Porter v. Ins. Co.*, 164 N. Y., 504); ordinarily it is. The policy itself makes it an important one when by its provisions the insured is required "to make a complete inventory stating the quantity and cost of each item and the amount claimed thereon," and in the celebrated case of *Claflin v. Ins. Co.* (110 U. S., 81), the United States Supreme Court held that questions as to the manner of payment for articles claimed for were material, and that intentionally false answers avoided the policy notwithstanding the contention that the answers were made not to prejudice the insurance companies but to mislead other persons.

The insured must of course comply with a requirement that he subscribe the examination but there must be a specific demand.

There are some other and very practical questions relating to these examinations which come to perplex the company adjusters at least, and before leaving the subject we might refer to them. They are (*a*) when such examination should be called and (*b*) whether more than one company may join in the call for it.

From an analysis of what has been written on the subject it would seem (*a*) that the examination must, of course, be called at a reasonable time; and what is a reasonable time would depend entirely upon the circumstances of the case. Where no demand for appraisal is made the examination should be called at a reasonable time within sixty days after the filing of proofs and in many cases there are often surrounding circumstances which reasonably justify the continuance of the examination beyond the time limited. Where, however, an appraisal is had and an examination is necessary, a request during the course of the appraisal, or within sixty days after the appraisal award would appear to be reasonable. There does not seem to be any case which is decisive

upon this particular question, and the rule of reason must control. (*b*) Cases involving a joint demand for appraisal are somewhat analogous and while there is a great difference of opinion, it would be reasonable to assume that a joint demand would be proper where the provisions of the respective policies are exactly similar. In a case arising in Ohio (*Insurance Company v. Hamilton,* 59 Federal, 258), a joint demand for appraisal was held improper; the respective policy provisions differed. In Michigan, where all the policies were similar, *Wicking v. Ins. Co.* (118 Mich., 640), the practice was approved; but in Kentucky (*Ins. Co. v. Asher,* 100 S. W., 233), and in Tennessee (*Ins. Co. v. Robertson,* 106 Tenn., 557) the decisions are to the contrary.

While the point is interesting it is not of great moment in its relation to the examination at least where in case of objection a separate and similar demand on the part of each company would be productive of the desired result.

What has been said of the examination may with equal and greater force be said of the exhibition and production of books, bills, etc., as required by the policy provisions; the insured is bound to comply with such a requirement in good faith, with due diligence, and to make every reasonable effort to furnish to the company the requisite information.

WHEN THE LOSS IS PAYABLE AND WHEN IS SUIT SUSTAINABLE.

It might occur to one that there was some inconsistency in the construction which the Courts have placed upon that provision of the policy where it is said that the "loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers, when appraisal has been required." At first reading the words "satisfactory proof of *the loss*" it would seem, ought to include the examination of the insured and the production and exhibition of his books, bills, etc. The courts have in fact construed this provision otherwise. The rule is that while the loss is payable at a certain specified time no suit is sustainable either at law or in equity until the insured has complied with other requirements of the company reasonably made.

In *McAllister v. Niagara Fire Insurance Co.* (156 N. Y., 80) which involved a policy in the standard form, the court held that the election to rebuild which is provided for in the policy "on giving notice within thirty days after the receipt of *the proof* herein required of its intention so to do" must be exercised within thirty

days from the receipt of the formal proofs of loss, following *Clover v. Greenwich Fire Ins. Co.* (101 N. Y., 277), where it was held in an action on a policy not in the standard form but of somewhat similar text that the proofs intended are the formal proofs of loss unconditionally required to be made by the Insured. In *McNally v. Phoenix Ins. Co.* (137 N. Y., 389) which did not involve a policy in the standard form it was held that a magistrate's certificate was not part of the proofs and the loss became payable sixty days after the filing of the formal proofs of loss. To a similar effect is *Lawrence v. Niagara Ins. Co.* (2 App. Div., 267; affirmed 154 N. Y., 752).

The result from the present condition of the Law in this State at least would seem to be:

(*1*) That the loss becomes payable: (*a*) within sixty days after notice and the filing of formal proofs which comply with the requirements of the policy if in the meantime no appraisal or ascertainment of the loss be had. (*b*) Where there has been an award the loss is payable sixty days from the making of the award unless proofs of loss were filed after the making of the award when the loss will not then be payable until sixty days from such filing. (*c*) If the loss be determined by agreement between the insured and the company, it will be payable sixty days from said determination unless proofs of loss were filed subsequent to that time in which case it would not become payable until sixty days from the time of filing.

(*2*) That suit is sustainable only after the loss becomes payable and the insured has fully complied with such requirements as have been demanded within a reasonable time. If therefore the time limited has passed and the loss becomes payable the insured upon complying with the requirements could sue immediately.

The courts of other states have adopted somewhat similar reasoning. In Illinois (*Huchberger v. Ins. Co.,* 12 Fed. Cases 793), it was held that the sixty days ran from filing proofs, not from the conclusion of an examination; and in Kansas (*Ins. Co. v. McLead,* 57 Kansas, 95), the time was held to run from filing proofs, not from the production of vouchers demanded, and in New Jersey (*Ins. Co. v. Gibbs,* 56 N. J. L., 579) it was held that suit could be commenced at the expiration of sixty days after furnishing formal proofs, notwithstanding that that period had not elapsed from the time of furnishing a magistrate's certificate. We must keep in mind, however, what has already been said this evening that there are decisions in some of the States that a

"disagreement" as to the amount of the loss makes the appraisal condition operative and a condition precedent to any action on the policy without any specific requirement for appraisal on the part of the company (*Murphy v. Insurance Company,* 61 Mo. App. 323; *Ins. Co. v. Erie Brewing Co.,* 30 Ohio Circuit Court 309).

The proofs of loss must, of course, be satisfactory in the sense that they are a substantial compliance with the policy conditions, and if those furnished are clearly defective and are rejected, the sixty day period would, naturally, run from the furnishing of proper proofs.

Kimball v. Ins. Co. (21 N. Y., Superior Ct., 495), where it was said by Hoffman, J., at page 501:

> "If the defect in the preliminary proofs furnished the 19th of November, was not waived, then the action ought not to have been commenced until the 21st of March, 1858. The question is of moment."

To the same effect are: *Ins Co. v. Hocking,* 115 Pa., 398; *Marino v. Ins. Co., 227* Pa., 120.

It is hardly necessary to add that a denial of liability would of course waive the sixty day limitation and suit would be at once sustainable.

The 12 Months Limitation.

We have now reached that provision of the policy which is the one remaining of the subject under discussion this evening, where it is provided that no suit shall be sustainable unless commenced within twelve months after the fire, and it may be said that there is no ambiguity in that language. It has been strictly construed by the courts and unless the company has extended the time limited, or done something to estop itself from asserting it, the right of action is absolutely gone at the end of the period, except in the one case which is provided for by statute in this State (Code Civil Procedure, Sec. 405) extending the time for another twelve months where action has been brought within the time limited but the action has terminated other than by voluntary discontinuance, dismissal for neglect to prosecute or a final judgment on the merits or a reversal on appeal where no new trial is awarded. It was at one time questioned whether the limitation in the policy was affected by this code provision but was settled in the case of *Bellinger v. Ins. Co.* (51 Misc., 463, affd. 113 A. D., 917), where it was held that the section did apply to the policy limitation.

The time begins to run from the day on which the fire occurred, and it may happen that when an appraisal award is not made until after the expiration of the period a suit will be sustained. In *Austen v. Ins. Co.,* 16 App. Div., 86) a suit brought within a month after an award and more than twelve months from the fire, was held timely; the delay, it was said, being due to dilatory action on the part of the appraisers. And in *Williams v. Ins. Co.* (90 App. Div., 413) a similar action was sustained.

There are cases (*Smith v. Glens Falls Ins. Co.,* 62 N. Y., 85; *Ins. Co. v. Hatton,* 55 S. W., 681) holding that where a compromise agreement fixing the loss has been entered into and a *promise of payment* made the policy limitation would not apply. These cases have no application to the usual agreement fixing the loss subject to the terms of the policy, which is of course controlled by the policy limitation (*Steinberg v. Boston Ins. Co.,* 144 App. Div., 110; *Stuart v. Reserve Fund Ass'n,* 78 Hun. 191).

Another statutory provision in this state that must be considered with the question under discussion is that contained in our Code Civil Procedure, (Sec. 399), which makes delivery of process for service to a Sheriff within the time limited and service within sixty days after the time limited an "attempt" to begin an action and a sufficient compliance. This statute has been held to apply to an action on an insurance policy (*Hamilton v. Ins. Co.,* 156 N. Y., 327).

When the company elects to rebuild under the policy provisions it is said that it thereby enters into a new contract, a building contract (*Morrell v. Ins. Co.,* 33 N. Y., 429; *Wynkoop v. Ins. Co.,* 91 N. Y., 478; *Heilmann v. Ins. Co.,* 75 N. Y., 7) and in an action brought to recover for breach of such a contract, it was held by the Court of Appeals of the District of Columbia (*Winston v. Ins. Co.,* 32 App. Cases, D. C., 61) that the twelve months' limitation contained in the policy which was substantially similar to that in the standard form had no application.

The company may, of course, extend the time or waive the time limitation (*Magner v. Mutual Life Ins. Co.,* 17 App. Div., 13; 162 N. Y., 657).

There remains one important question which requires critical analysis, and that is the effect of this time limitation when an interest other than that of the insured is also covered. Such interests we know are to be the subject of future discussion and I might simply state that the Court of Appeals has by inference at least said that it has no application to a mortgagee under a Stand-

ard Mortgagee Clause (*Heilbrunn v. Ins. Co.*, 202 N. Y., 610). It may be of interest to note, however, that this Court in the case of *McArdle v. Ins. Co.* (183 N. Y., 368) where payment had been made to the insured notwithstanding a loss payable clause to another as "interest may appear" held that suit by the person to whom the loss was payable was not sustainable under the policy limitation, for the reason that it was commenced more than twelve months after the fire.

"THE TRUE PURPOSE OF THE LOSS SETTLEMENT"—Theory of Insurance. Indemnity. —*Allen E. Clough.*

"WHAT IS A FIRE LOSS?"—Direct and Consequential loss—the distinction between. No Liability for loss by interruption of business, manufacturing processes or otherwise. First lines of policy and policy condition line 42. —*W. N. Bament.*

"CASH VALUE"—Actual cash value of property at the time any loss or damage occurs. Liability is for the actual cash value of the property at the time any loss or damage occurs, with proper deduction for depreciation however caused, and shall in no event *exceed* what it would then cost the assured to repair or replace same with material of like kind or quality. Policy condition lines, 1, 2. —*L. C. Williams.*

"THE APPRAISAL" — Appraisals — Options reserved to the company. Policy condition lines 3-5, 86-93. —*W. O. Robb.*

"THE CLAIM—THE PROOF OF LOSS—WHEN IS LOSS PAYABLE?"—The sum for which the company is liable shall be payable sixty days after due notice, ascertainment, estimate and satisfactory proof of loss have been received by company in accordance with the terms of the policy. What is a claim and satisfactory proof of loss? Policy condition lines 2, 3, 4, 67-85, 92-95, 106-107. —*Robert J. Fox.*

"ABANDONMENT, PROTECTION AND REMOVAL OF PROPERTY"—There can be no abandonment of the property to the company, and, if the property is so endangered by fire as to require removal to a place of safety the future liability of the company in reference thereto, including its cover during and after the fire, and whether liable for the expense of the removal of the goods in danger; the duty of the assured to protect his property from further damage. Policy condition lines 5, 6, part of 32, 33, 60-66, 67, 68. —*Frederick B. Campbell.*

"CONCEALMENT, MISREPRESENTATION, FRAUD OR FALSE SWEARING"—Before or after a loss. Policy condition lines 7-10. —*Frank Bowers.*

"OWNERSHIP"—Sole and unconditional ownership—Insurable interest—Change in interest, title or possession. Policy condition lines 16, 17, 18, 19, 20, 21, 22. —*Edgar J. Nathan.*

"INCREASE IN HAZARD"—Policy condition lines 11-16, 23-30, 49-50. —*Hartwell Cabell.*

"FORMER AND PRESENT DAY METHODS OF ADJUSTMENT" —*Samuel R. Weed.*

"NON-LIABILITY MATTER"—No liability for loss by order of civil authority; for loss by explosion unless fire ensues; if building or any part thereof fall except as a result of fire; for loss occasioned by ordinance or law regulating construction or repair of building. Policy condition lines 31, 32, 34, 36, 37. —*William B. Ellison.*

"UNUSUAL AND INTERESTING FIRE LOSS CLAIMS" —*William R. Pitcher.*

"LIABILITY FOR INTERNAL REVENUE TAX AND CUSTOMS DUTY"

"NON-LIABILITY MATTER, UNLESS SPECIFICALLY ASSUMED"—No liability, unless specifically assumed on drawings, tools, implements, models, patterns, scientific apparatus, store or office furnitures, or fixtures, or property held on storage or for repairs. Policy condition lines 38-41. —*W. J. Nichols.*

"THE MORTGAGEE CLAUSES. THE STANDARD MORTGAGE CLAUSE, THE SIMPLE LOSS PAYABLE CLAUSE"—If with the consent of the company there exists under the policy an interest in the subject of insurance—in favor of others than the assured—How the preceding conditions are to be applied. Policy condition lines 56 to 59, inclusive. —*Leo Levy.*

"SUBROGATION"—And the effect of a waiver of subrogation rights. Policy condition lines 102-105. —*W. H. Van Benschoten.*

"CANCELLATION AND SUBSTITUTION"—Knowledge and authority of agent or broker. Policy condition lines 51-55. —*Martin Comboy.*

"WAIVER AND ESTOPPEL" —*W. J. Nichols.*

"THE AGENT—AUTHORITY OF AGENT AND OFFICERS OF COMPANY"—No person unless duly authorized in writing shall be deemed the agent. Policy condition lines 47, 48. This policy made and accepted subject to the foregoing stipulations, (closing paragraph of Standard Policy). —*Frederick T. Case.*

"ADMINISTRATOR, EXECUTORS, ETC."—Authority of over real property—Authority of receivers, trustees and receivers of rents. —*F. O. Affeld, Jr.*

"THE COMMISSION CLAUSE"—For whom it may concern: as now or may hereafter be constituted. —*W. J. Greer.*

"PSYCHOLOGY OF LOSS ADJUSTMENTS"— —*George R. Branson.*

"ASCERTAINMENT OF VALUE AND PROFITS FROM BOOKS OF ACCOUNT" —*Jas. A. McKenna.*

"SALVAGE HANDLING"—Why and how; should be minimized. —*E. W. Wile.*

"DANGERS AND DISAPPOINTMENTS IN SALVAGE HANDLING" —*Edward L. Lewis.*

"ADJUSTMENT OF STOCK LOSSES" —*D. C. Brown.*

"ADJUSTMENT OF AUTOMOBILE LOSSES" —*E. B. Hopwood.*

"ASCERTAINMENT OF MACHINERY VALUES AND LOSSES" —*John Hankin.*

"ADJUSTMENT OF BUILDING LOSSES" —*W. R. Freeman.*

"ADJUSTMENT OF COTTON LOSSES AND HANDLING OF COTTON SALVAGE" —*William A. Cooke.*

"USE AND OCCUPANCY; PROFITS AND COMMISSIONS; RENTS AND LEASEHOLD INSURANCE" —*W. O. Robb.*

"WHOLE INSURANCE"; NON-CONCURRENT INSURANCE—What is the "Whole Insurance"—apportionment of non-concurrent insurance. Policy Condition lines 96-98. —*Allen E. Clough.*

PRINTED APRIL, 1915

20482

END OF
TITLE